Supreme Court No. 100060-0
(COA No. 812599)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ISABELITA HAWKINS,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. INTRODUCTION

A person's criminal conviction subjects them to employment and housing discrimination that disproportionately impacts communities of color—a form of economic and civil exclusion comparable to Jim Crow laws.

Lita Hawkins, a Black woman who worked as a registered nurse and was an army veteran, had no criminal convictions until she suffered a mental health crisis in her 40's. After completing her sentence she became eligible to vacate her convictions under RCW 9.94A.640. This statute allows a person to restore their civil rights by vacating a conviction after meeting stringent criteria, but is further subject to judicial approval with no limit on a judge's discretion to deny a motion to vacate. A judge twice denied Ms. Hawkins's motion to vacate her convictions, citing to "underlying events," in the probable cause statement, even though the State never proved these allegations because it reduced the charges.

This Court should accept review. Allowing a judge unfettered discretion to deny a person their civil rights based on unproven allegations is unreliable and risks perpetuating

systemic racism through unconscious racial bias, contrary to this Court's exhortation to directly address and eradicate this enduring blight on our criminal justice system. RAP 13.4(b)(1)(4).

B. IDENTITY OF PETITIONER AND OPINION BELOW

Lita Hawkins, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review on June 7, 2021, for which reconsideration was denied on July 9, 2021, pursuant to RAP 13.3 and RAP 13.4.

C. ISSUES PRESENTED FOR REVIEW

1. Though RCW 9.94A.640 gives a judge discretion to deny a motion to vacate a person's conviction, that discretion must not be unfettered. Allowing a court to deny a person the opportunity to restore their full citizenship rights based on unproven allegations in a probable cause statement is unreliable and risks perpetuating systemic racism through unconscious racial bias. Review by this Court is necessary to guide judicial discretion in the application of RCW 9.94A.640. RAP 13.4(b)(4).

2. Contrary to this Court's caselaw that takes judicial notice of unconscious racial bias, the Court of Appeals subjected

Ms. Hawkins's claim that unlimited judicial discretion risks perpetuating racist outcomes to RAP 2.5(a) review and required "evidence" that "Hawkins's race played a role in her prosecution, sentence, or the denial of a motion to vacate her convictions," before considering the issue. This Court should accept review. RAP 13.4(b)(1)(4).

D. STATEMENT OF THE CASE

1. Ms. Hawkins, a registered nurse and Navy veteran, has a mental health crisis that results in criminal convictions.

Isabelita Hawkins's mother grew up in poverty and raised her as a single parent. RP 42. As an adult, Ms. Hawkins joined the Navy and later became a registered nurse. RP 41; CP 82. She accomplished these things with her mother in mind. RP 41. Ms. Hawkins loved her mother dearly, and wanted to her to be financially stable and comfortable in life. RP 41.

Ms. Hawkins was a "med-surg" nurse. RP 42. Though she had taken some mental health courses in nursing school, she did not see the emerging signs of her own mental health issues. RP 42. Ms. Hawkins was abused by her stepfather as a child and suffered from PTSD and depression as an adult. CP 91. In 2011,

when she was about 43 years old, Ms. Hawkins was overtaken by a psychosis but did not realize what was happening. RP 42. She sought mental health treatment, but was misdiagnosed and received substandard psychiatric care. CP 94.

One day at work she had an altercation with another nurse that resulted in her being charged with assault in the third degree. CP 9. Soon after, she had a mental breakdown and threatened her mother with a knife, resulting in the criminal charge of assault in the first degree (domestic violence). CP 8.

Ms. Hawkins was held in jail for nearly a year, where she received mental health treatment. RP 34, 38.

The experienced prosecutor who handled Ms. Hawkins's case described this as "one of the most difficult to digest of my career." RP 23. Despite the seriousness of the allegations, the prosecutor saw "there were significant mitigating circumstances and circumstances that . . . need treatment and need to be addressed." RP 23.

Through Ms. Hawkins's participation in Veterans Court, the parties crafted a resolution that would provide Ms. Hawkins with supervision, treatment, and an opportunity to transition

back into the community. RP 23-24. The prosecutor and Ms. Hawkins asked the court to impose a first time offender waiver with 12 months of DOC supervision, with the conditions of mental health and substance abuse evaluation and treatment, and to follow all the conditions of the Veterans Court. RP 24-25.

The State filed an amended Information that reduced the first degree assault charge to harassment (domestic violence) and reduced the third degree assault charge to malicious mischief. RP 4-5; CP 15-16. Ms. Hawkins pleaded guilty to the reduced charges and stipulated to allegations in the probable cause state statement as "real and material" for purposes of "this sentencing" only. CP 39 (emphasis added).

Judge Michael Trickey presided over Ms. Hawkins's plea and sentencing. He reviewed the documents the prosecutor provided in support of the recommendation, including Ms. Hawkins's mental health reports and the probable cause statement. RP 5-6. Ms. Hawkins admitted to only the conduct constituting the reduced charges in her plea. RP 20-21; CP 28.

At Ms. Hawkins's sentencing, her mother, the Veterans Court Monitor, and the Seattle Police Department Domestic

Violence Advocate all spoke in favor of the agreed upon recommendation to the reduced charges. RP 22, 29-35. When Ms. Hawkins's mother addressed the court, she spoke of her love for her daughter and reminded the court that Ms. Hawkins's "crime" was mental illness:

> Isabelita is a very honorable person, a very loving person . . . This disease has come into her heart, into her life, and now we have to fix it. I told her, I said, it's just like me being a diabetic, the way you got on me, I will get on you. So therefore, Your Honor, I want you to know that I would not be standing here before you and others if my child was not worthy of me being here.

RP 32.

The Veterans Court Monitor who worked with Ms. Hawkins was "almost speechless" about Ms. Hawkins's progress, insight, and commitment to treating her mental health. RP 34.

Ms. Hawkins told the court about her love for her mother, her profound sorrow and remorse, and her determination to ensure nothing like this would ever happen again. RP 38-43. She thanked the jail doctors and staff who treated her and the prosecutors for their willingness to work with her. RP 38.

Her attorney noted "it's clear to anybody looking at it very quickly can see that clearly what happened is related to her

mental health . . . there's really no other explanation, there's no rational reason for what – what occurred." RP 38-39.

Judge Trickey was confident, given all that Ms. Hawkins had accomplished in life, that she would successfully complete the conditions of her sentence. RP 45. The court granted the first offender waiver and ordered the proposed conditions. RP 45-46.

2. The court denies Ms. Hawkins's motion to vacate her convictions despite her eligibility under the statute and evidence that she restored her mental health.

Judge Trickey was right about Ms. Hawkins. She fully complied with all the terms of her sentence and the court ordered a Certificate and Order of discharge under RCW 9.94A.637 in January of 2015. CP 52.

In 2019, Ms. Hawkins was eligible to vacate her convictions and she filed a motion that established she met the criteria for vacating her record under the statute. CP 54, 71. The State agreed with the proposed order to vacate. CP 77.

Judge Chad Allred, Judge Trickey's successor, denied Ms. Hawkins's motion in a written order, citing to the "underlying events" in the probable cause statement that was filed along with her guilty plea and judgment and sentence. CP 54.

Ms. Hawkins filed a second motion to vacate in January of 2020 and provided more information to the court about her personal circumstances and mental health treatment both at the time of the offense in 2012 and afterwards. CP 71. The court learned that Ms. Hawkins had for years been participating in mental health services and treatment at the VA, where she was under the care of a psychiatrist and had an established treatment regimen. CP 83. She had no subsequent psychiatric hospitalizations, and no subsequent criminal convictions. CP 84.

In a medical report submitted for her lawsuit against the VA for negligent treatment preceding Ms. Hawkins's mental breakdown in 2011, an expert determined that Ms. Hawkins received substandard mental health treatment. CP 94-95.

Ms. Hawkins lost her nursing license because of her criminal convictions. CP 93. Just like so many with a criminal conviction, her convictions were a barrier to securing housing and employment. CP 82. She aspired to regain her nursing license and train as a psychiatric nurse to work with veterans of color like herself. CP 82, 84.

After reviewing these additional materials, Judge Allred again denied Ms. Hawkins's motion to vacate, stating the identical basis for denying it as in the first order. CP 63-64.

The Court of Appeals acknowledged that a different judge could have viewed Ms. Hawkins's criminal charges and mitigating evidence differently. Appendix 1 (Op. at 8). However, the court affirmed, finding no error in Judge Allred's reliance on unproven allegations in a probable cause statement. *Id.*

The Court of Appeals additionally found Ms. Hawkins contravened RAP 2.5(a) by arguing the risk of unconscious racial bias is great where a court has complete discretion to deprive a Black woman of her civil rights, including based on unproven allegations as occurred here. Op. at 6. The court claimed it would not "tolerate racial bias, whether implicit or overt, in any discretionary decision," but also demanded "evidence" that Ms. Hawkins's "race played a role in her prosecution, sentence, or the denial of a motion to vacate her convictions." Op. at 6.

E. ARGUMENT

1. **This Court should accept review and address how a judge's unfettered discretion to deny a person their civil rights risks perpetuating systemic racial discrimination.**

A person with a criminal record experiences legal discrimination by "employers, landlords, and whoever else conducts a background check" that is so severe it constitutes a form of "civil death." *Utah v. Strieff*, 579 U.S. ___, 136 S. Ct. 2056, 2070, 195 L. Ed. 2d 400 (2016) (Sotomayor, J., dissenting).

Our legislature expressed an intent to restore deserving people to their "preconviction status as a full-fledged citizen" by allowing a court to vacate a person's criminal conviction when they meet certain stringent criteria. *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001) (citing to RCW 9.95.240). RCW 9.94A.640(1) provides that a court "may clear the record of conviction" when the person meets the statute's requirements, but provides no additional criteria to guide the court's discretion to grant or deny a motion.[1] Appendix 3 (RCW 9.94A.640).

[1] In 2020 the legislature passed House Bill 2793, or "The Clean Slate Act," which would have implemented a state-wide, automatic administrative procedure to vacate eligible convictions. Rachel M. Cohen, Washington Governor Vetoes Bill that Would Have Automatically Cleared Criminal Convictions, *The Appeal*, (March 19, 2020)

There is no dispute that Ms. Hawkins is eligible to vacate her convictions under RCW 9.94A.640 because they are class C felonies, she successfully completed her community custody supervision, and she has had no new criminal convictions for over five years. CP 71. However, Judge Allred twice denied her motion to vacate based on unproven allegations in a probable cause statement. CP 54-55, 63-64.

a. This Court should grant review and guide a court's discretion in applying RCW 9.94A.640 to ensure a person is not deprived of their civil rights based on unreliable evidence.

This Court prohibits sentencing courts from increasing punishment based on unproven facts; the same should be true when a court considers whether to restore a person's civil rights.

Judge Allred's denial order stated he received Ms. Hawkins's Statement on Plea of Guilty, the Certification of Probable Cause, and the felony plea agreement "in which she

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(https://theappeal.org/politicalreport/washington-governor-vetoes-clean-slate-bill)(last accessed 8/4/21). However, Governor Inslee vetoed the bill due to the "catastrophic effects" of COVID-19 on the "economic health of our State." Jay Inslee, Governor's Veto Message, House Bill 2793, (April 3, 2020)(https://crmpublicwebservice.des.wa.gov/bats/attachment/vetomessage/98f7d468-1076-ea11-8181-005056ba1db5#page=1). The Governor was nevertheless clear that he supported the legislature's effort to automatically vacate a person's conviction, "regardless of whether it got his signature this time around." *Id.*

stipulated to the facts in the Certifications." CP 54. The Court denied her motion in a written order, stating "[t]hese documents detail the underlying events during which Ms. Hawkins made death threats and chased and stabbed her mother with an eight-inch knife, and, on another occasion, became hostile and caused damage at a healthcare facility." CP 54.

The court ruled, "Exercising its discretion under RCW 9.94A.640(1), and based on the particular facts of this specific case, the Court finds that is not reasonable or appropriate to allow Hawkins to . . . vacate her conviction." CP 54-55.

The trial court was wrong in stating that Ms. Hawkins "stipulated" to the allegations in the "Certifications," and in relying on those unproved, unadmitted allegations to deny relief. Prior to Ms. Hawkins's plea, the State moved to amend the information, reducing its charges to assault in the third degree and malicious mischief in the second degree. RP 4-5; CP 15-16. The plea agreement included a stipulation that facts in the probable cause statement were "real and material" for purposes of "this sentencing." CP 39 (emphasis added). However, in her guilty plea, Ms. Hawkins admitted only to conduct that

established the reduced charges, not the dismissed charges referred to by Judge Allred. RP 20. Her plea form stated:

> On December 15, 2011, I knowingly and without lawful authority did threaten to cause bodily injury immediately to Sandra Johnson, my mother, by threatening to kill her words did place said person in reasonable fear that the threat would be carried out in King County, WA.
>
> Also, on October 22nd, 2011, I did knowingly and maliciously cause physical damage in excess of $750.00 to a copy machine, the property of the Veterans' Administration in King County, Washington.

CP 28; RP 20-21.

Ms. Hawkins admitted to threatening to kill her mother, not, as found by the trial court in its denial order, that she "stabbed her mother with an eight-inch knife." CP 54. Likewise, the court's description of Ms. Hawkins becoming "hostile" in causing damage to property is not contained in her statement of guilt—she admitted only to causing property damage. CP 54.

A court abuses its discretion when it relies on "unsupported facts." *Mayer v. Sto Indus., Inc.,* 156 Wn.2d 677, 684, 132 P.3d 638 (2003). Allegations in a probable cause statement for reduced or dismissed charges are not equivalent to facts found by a jury or admitted by the defendant. *See, e.g.,*

State v. Olsen, 180 Wn.2d 468, 473-74, 325 P.3d 187 (2014). That Ms. Hawkins stipulated the facts alleged in the probable cause statement were "real and material facts for purposes of this sentencing" means just this—she stipulated to the facts for purposes of sentencing on the reduced charges of harassment and malicious mischief. CP 39 (emphasis added). This is not a stipulation that she committed all of the acts in the probable cause statement for any other purpose.

In pleading guilty to a reduced charge, the defendant has no incentive to challenge the State's unproved allegations that are not contained as an element of the reduced offense. *State v. Thomas*, 135 Wn. App. 474, 485, 144 P.3d 1178 (2006) (citing *In re Pers. Restraint of Lavery,* 154 Wn.2d 249, 258, 111 P.3d 837 (2005)). This is why a court's comparability analysis of an out-of-state offense is limited the elements of the offense the person pleads guilty to. *Olsen,* 180 Wn.2d at 473-74.

This logic should apply when a court considers whether to vacate a person's conviction under RCW 9.94A.640, which establishes eligibility based on the crime of conviction and a period of time without any new convictions. This Court should

grant review of the Court of Appeals' opinion that refuses to guide a trial court's discretion and disregards well-settled principles of fairness and accuracy in assessing prior convictions. RAP 13.4(b)(4).

b. Ensuring courts do not perpetuate historic forms of racial exclusion is a matter of substantial public interest and required by this Court's caselaw.

This Court recently reminded the legal community, "the injustices faced by black Americans are not relics of the past. We continue to see racialized policing and the overrepresentation of black Americans in every stage" of the criminal justice system, and "[o]ur institutions remain affected by the vestiges of slavery and Jim Crow laws that were never dismantled." Letter from The Washington State Supreme Court, to Members of the Judiciary and the Legal Community (June 4, 2020).[2] Labelling "people of color 'criminals'" has perpetuated the vestiges of Jim Crow Laws by another name. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 2 (2010).

[2]Available at http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.

This Court's open letter exhorted the legal community to develop a greater awareness of conscious and unconscious biases in order to make just decisions in individual cases and bring "greater racial justice to our system as a whole." Indeed, "as our understanding and recognition of implicit bias evolves, our procedures for addressing it must evolve as well." *State v. Berhe,* 193 Wn.2d 647, 663, 444 P.3d 1172 (2019).

The Court of Appeals admitted a different judge would have viewed Ms. Hawkins's mitigation evidence differently. Op. at 8. Judge Allred focused on Ms. Hawkins's alleged conduct that he deemed violent and "hostile"[3] enough to insist that she remain branded a felon, rather than seeing what her attorney believed was "clear to anybody looking at it…that clearly what happened is related to her mental health. . . there's really no other explanation." RP 38-39. Judge Allred's subjective view about Ms. Hawkins has life-altering consequences—it

[3] Studies show that Black people are more likely to be considered "violent, hostile, and aggressive" by white people. Fanta Freeman, *Do I Look Like I Have an Attitude? How Stereotypes of Black Women on Television Adversely Impact Black Female Defendants Through the Implicit Bias of Jurors*, 11 Drexel L. Rev. 651, 657 (2019).

determines whether she will have the right of full citizenship. *See, e.g., Breazeale*, 144 Wn.2d at 837.

The Court of Appeals' refusal to constrain a judge's discretion to the qualifying criteria of the statute means a person may be denied their civil rights for any reason, including a judge's perception about unproven allegations, which carries an inherent risk of unconscious bias for people of color. This Court should accept review to address this critical stage where unconscious racial bias may produce unjust outcomes and perpetuate systemic racial discrimination. *See, e.g., State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015) ("National and local cries for reform of broken LFO systems" drive the court's decision). RAP 13.4(b)(4).

2. The Court of Appeals' decision applying RAP 2.5(a) and requiring "evidence" of racial discrimination in order to address unconscious racial bias is contrary to decisions by this Court.

This Court takes "judicial notice of implicit and overt racial bias against black defendants in this state." *State v. Gregory,* 192 Wn.2d 1, 22, 427 P.3d 621 (2018). This is necessary because unconscious racial bias may manifest "in apparently

race-neutral explanations for actions and decisions that were, in fact, influenced by unconscious racial bias." *Berhe*, 193 Wn.2d at 665–66 (citing *State v. Saintcalle*, 178 Wn.2d 34, 49, 309 P.3d 326 (2013)).

This Court is clear: we should not "throw up our hands in despair at what appears to be an intractable problem. Instead, we should recognize the challenge presented by unconscious stereotyping ... and rise to meet it." *Id.* at 664. Contrary to this Court's direction, the Court of Appeals refused to consider the risk of unconscious racial bias absent "evidence" that race played a role in Ms. Hawkins's "prosecution, sentence, or motion to vacate." Op. at 6.

The "evidence" here is that Ms. Hawkins, a Black woman, received substandard mental health care, had a mental health crisis, was arrested and jailed for over a year, and pleaded guilty to criminal charges, despite all parties recognizing the charges were the result of her untreated mental health. The evidence is that a judge then found that unproven allegations against Ms. Hawkins's showed she was "hostile" and violent, and insisted she continue to be branded a criminal by denying her motion to

vacate even though Ms. Hawkins was eligible to vacate her convictions under RCW 9.94A.640. CP 54-55; CP 63-64.

The evidence is that when judges "exercise discretion, … bias often plays a role." Research Working Group & Task Force on Race, the Criminal Justice System, Preliminary Report on Race and Washington's Criminal Justice System, 35 Seattle U.L. Rev. 623, 629 (2012). And "there is substantial evidence to support the notion that racial inequities do permeate the criminal justice system." *Id.* at 636.

Given this Court's recognition of racial discrimination at every stage of the criminal justice system, this is enough "evidence" to address Ms. Hawkins's claim that there is a risk of unconscious racial bias in the court's unfettered discretion to deny her motion to vacate. Op. at 6; *See Gregory*, 192 Wn.2d at 22 ("We need not go on a fishing expedition to find evidence" of racial bias. "Our case law and history of racial discrimination provide ample support."). This Court should accept review to correct the Court of Appeals' derogation of its duty to address unconscious and systemic racial bias by requiring "evidence" of racial discrimination by an individual judge against a specific

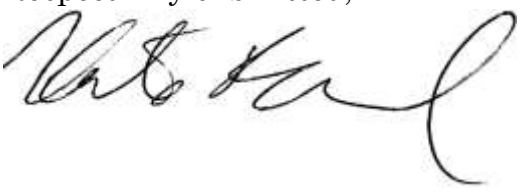
defendant. Unfettered judicial discretion creates an intolerably high risk of unconscious racial bias, and this Court should interpret RCW 9.94A.640 to limit judicial discretion consistent with the other sections of the statute. RAP 13.4(b)(1),(4).

F. CONCLUSION

Limiting a court's discretion to deny a person their civil rights to the statutory criteria provided by the statute is an important means of preventing unconscious racial bias and unjust outcomes that this Court understands is present at every stage of the criminal justice proceedings. This Court should accept review of the Court of Appeals decision that abdicates its duty to address unconscious bias that continues to perpetuate systemic racial discrimination based on one's criminal conviction. RAP 13.4 (b)(1),(4).

DATED this 9th day of August, 2021.

Respectfully submitted,



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APPENDIX

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APPENDIX 1

(Court of Appeals Decision)

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SABELITA LAVAUGHN HAWKINS, Appellant.	)	No. 81259-9-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, A.C.J. — Sabelita Hawkins appeals the denial of a motion to vacate her 2011 convictions for felony harassment and malicious mischief, arguing that the sentencing court abused its discretion by basing its denial on facts contained in the probable cause certifications for the crimes. The sentencing court's reliance on facts contained in the probable cause certifications was not an abuse of discretion, and we affirm.

FACTS

In 2011, at the age of 43, Sabelita Hawkins had established a career as a registered nurse at the Seattle Veterans Administration hospital. That year, however, she experienced a period of psychosis that led to two incidents during which she assaulted others. In October 2011, Hawkins assaulted a coworker at the VA, resulting in Hawkins being charged with third degree assault. Several

weeks later, Hawkins stabbed her mother multiple times, unprovoked and in the presence of her two-year-old daughter. The State charged Hawkins with first degree assault for this incident.

Hawkins received mental health treatment while awaiting trial for the next year, showing great improvement. On December 21, 2012, Hawkins pleaded guilty to reduced charges of felony harassment and second degree malicious mischief.

The plea agreement provided: "In accordance with RCW 9.94A.530, the parties have stipulated that the following are real and material facts for purposes of this sentencing: The facts set forth in the certification(s) for determination of probable cause and prosecutor's summary." The sentencing court, based on the parties' agreed recommendation, reviewed these materials and imposed a "First Time Offender Waiver" sentence under RCW 9.94A.650. Hawkins was sentenced to 90 days of incarceration, with credit for time served, which the court deemed satisfied at her sentencing hearing, and to other conditions, including 12 months of community custody, a substance abuse evaluation, and a mental health evaluation. She also agreed to opt into the King County District Court's Regional Veterans Court for a related assault in the fourth degree conviction.

Hawkins complied with the terms of her sentence and the court entered a certificate and order of discharge under RCW 9.94A.637 in January 2015.

In 2019, Hawkins filed a motion to vacate her convictions under RCW 9.94A.640. Her motion established that she was eligible under the statute and the State agreed with the proposed order to vacate. The sentencing court, however, denied the motion because the plea agreement and certification of probable cause

> detail the underlying events during which Hawkins made death threats and chased and stabbed her mother with an eight-inch knife and, on another occasion, became hostile and caused damage at a healthcare facility. . . . [B]ased on the particular facts of this specific case, the Court finds that it is not reasonable or appropriate to allow Hawkins to withdraw her guilty plea or to vacate her conviction.

Hawkins filed a second motion to vacate in January 2020, providing more information about the extent and success of her mental health treatment since 2011 and her difficulty in locating employment since her felony convictions. She attached a mitigation report submitted by the King County Department of Public Defense detailing her success in mental health treatment since she was released from jail in 2012. Hawkins also submitted a psychiatric evaluation conducted in 2017, which indicated that Hawkins's brief psychotic disorder from 2011 was in remission and concluded that the VA psychiatrists who evaluated her in October and November 2011 provided an inadequate assessment of and treatment for Hawkins's mental illness. The sentencing court, however, again denied the motion to vacate on the same basis. Hawkins appeals.

ANALYSIS

RCW 9.94A.640(1) provides, "[e]very offender who has been discharged under RCW 9.94A.637 may apply to the sentencing court for a vacation of the offender's record of conviction. If the court finds the offender meets the tests prescribed in subsection (2) of this section, the court may clear the record of conviction." The State does not dispute that Hawkins is not disqualified from seeking to have her convictions vacated under RCW 9.94A.640(2). But even if an offender is not disqualified under RCW 9.94A.640(2), "RCW 9.94A.640(1), by its plain language, vests the sentencing court with the discretion to grant or deny a

motion to vacate the offender's record of conviction." State v. Kopp, 15 Wn. App. 2d 281, 287, 475 P.3d 517 (2020).

We therefore review the sentencing court's decision to deny a motion to vacate for abuse of discretion. Id. A court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." State v. Lamb, 175 Wn.2d 121, 127, 285 P.3d 27 (2012) (quoting State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). A decision is based on untenable reasons if it "is based on an incorrect standard or the facts do not meet the requirements of the correct standard" and is manifestly unreasonable if it "is outside the range of acceptable choices, given the facts and the applicable legal standard." Lamb, 175 Wn.2d at 127 (quoting In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

Hawkins argues that the sentencing court violated its discretion by relying on facts contained in the probable cause certifications, specifically the fact that she stabbed her mother and became hostile at her place of work. Hawkins asserts that, because her felony plea agreement included a stipulation that facts in the probable cause certification were "real and material facts for purposes of this sentencing," the stipulated facts cannot be used "for any purpose other than for sentencing on the reduced charges."

We recently addressed an identical issue in Kopp, 15 Wn. App. 2d 281. The defendant in that case, charged with second degree rape, pleaded guilty to an amended charge of third degree assault. Id. at 283. In his plea agreement, Kopp also stipulated to the facts contained in the probable cause certification as "real and material" for the purposes of sentencing, in accordance with RCW 9.94A.530.

Id. at 288. The sentencing court then denied his subsequent motion to vacate the conviction, citing his plea agreement and facts contained in the probable cause certification. Id. at 283-84. On appeal, Kopp argued that the sentencing court abused its discretion by relying on the stipulated facts in the probable cause certification to deny the motion to vacate. Id. at 287.

Under RCW 9.94A.530(2), the sentencing court "may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." We held in Kopp that the sentencing court did not abuse its discretion in relying on those facts in denying a motion to vacate under RCW 9.94A.640(1). Id. at 288. We reasoned that, "[i]f Kopp agreed that the sentencing court could rely on the facts in the probable cause certification when determining the appropriate sentence, we can see no abuse of discretion in relying on those same facts when deciding whether to vacate that conviction." Id. Kopp is dispositive of Hawkins's appeal.

Hawkins seeks to distinguish Kopp on two bases. First, she contends she did not agree that the unproven facts in the probable cause certification could be used for any purpose other than sentencing. But we considered and rejected that same argument in Kopp. Both defendants pleaded guilty to a reduced charge and, in the process, stipulated to facts as "real and material facts for purposes of [] sentencing." Kopp establishes that, where a defendant stipulates to a set of facts for the purpose of sentencing, the sentencing court may rely on those facts in subsequent vacation proceedings. The stipulated facts were not merely unproven allegations, but were real and material for the purposes of both sentencing and

Hawkins's motion to vacate. The sentencing court thus did not abuse its discretion when it relied upon those facts in denying Hawkins's motion.

Second, Hawkins argues Kopp did not address whether "a judge should have unfettered discretion to deprive a Black person of her civil rights in light of the criminal justice system's role in perpetuating legalized forms of racial discrimination." She argues that such unfettered discretion risks the arbitrary and racially biased application of the vacation statute, citing our Supreme Court's recognition of the "implicit and overt racial bias against black defendants in this state," in State v. Gregory, 192 Wn.2d 1, 22, 427 P.3d 621 (2018).

We note that Hawkins raises this issue for the first time on appeal in contravention of RAP 2.5(a). She did not argue below that reliance on the probable cause certification to evaluate her motion to vacate perpetuated racial bias in the criminal justice system. We acknowledge that the criminal justice system has perpetuated legalized forms of racial discrimination against Black defendants and that the judiciary has played a role in this discrimination. We will not tolerate racial bias, whether implicit or overt, in any discretionary decision a trial court may make.

But without evidence, we cannot reach the conclusion that Hawkins's race played a role in her prosecution, sentence, or the denial of a motion to vacate her convictions. The record here establishes that Hawkins assaulted a co-worker at the VA and two months later, assaulted her mother with a knife. Her mother "sustained lacerations/stab wounds to her face, left shoulder, and upper back." Hawkins's mother faced multiple surgeries to repair the damage from this assault because "the knife penetrated all the way through her cheek, and cut her tongue, which required surgery to repair, while another stab wound was deep enough to

puncture her lung." Hawkins was originally charged with assault in the first degree for the attack on her mother and assault in the third degree for the assault of her co-worker.

During Hawkins's sentencing hearing, the State indicated that it was initially working on a resolution of these charges whereby Hawkins would plead "not guilty by reason of insanity" but the State abandoned that effort when it learned Hawkins could not receive treatment from the Veterans Administration if such a plea were entered. So instead it crafted a plea agreement that would provide a similar level of structure and supervision to allow Hawkins to transition safely back into the community. The State and Hawkins agreed she would enter a guilty plea to a charge of assault in the fourth degree in district court so that she could enter King County District Court's Regional Veterans Court and have two to five years of court supervision. They agreed Hawkins would then plead guilty to reduced charges of felony harassment and malicious mischief in superior court and agreed to recommend a First-Time Offender Waiver sentence. As a part of the deal, the State worked with the VA to ensure Hawkins had supportive housing for up to two years. Hawkins's mother supported the plea agreement and the treatment plan the VA had set up for Hawkins and expressed her appreciation to the prosecutor, the VA, and the court for helping her daughter recover.

The sentencing court, in accepting the joint sentencing recommendation, indicated it was impressed with the degree of thought that had gone into finding an appropriate resolution for Hawkins. It noted that if Hawkins had been convicted of assault in the first degree, she could have been sentenced to 5 years in prison. The recommended First-Time Offender Waiver sentence was, in the court's

opinion, "a gift." "Instead of five years in prison, you've been given an opportunity to heal your life and your relationship with your mother."

In light of the facts of the incidents that led to Hawkins's criminal charges, the subsequent significant reduction in those charges, the recommended sentence that ensured that Hawkins would obtain treatment, and the sentencing court's acceptance of the joint recommendation, the record does not support the allegation that Hawkins's race, either implicitly or overtly, played a role in this particular case.

Nor did the sentencing court overlook Hawkins's mitigation evidence when it considered whether to vacate her convictions. It explicitly indicated it had "carefully reviewed" the material she submitted, including the mitigation report and psychiatric evaluation. While different courts could have reasonably viewed Hawkins's psychotic episode and isolated assaultive conduct as a symptom of her disease and evaluated the mitigation evidence differently, we are constrained by the standard of review and the evidentiary record before us. The sentencing court's decision not to vacate her convictions was not outside the range of acceptable choices and we therefore can find no abuse of discretion.

Affirmed.

Andrus, A.C.J.

WE CONCUR:

Chun, J.

Verellen, J.

APPENDIX 2
(Order Denying Reconsideration)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON ,

Respondent,

v.

SABELITA LAVAUGHN HAWKINS,

Appellant.

No. 81259-9-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Sabelita Hawkins, has filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Andrus, A.C.J.
Judge

APPENDIX 3
(Full Text of RCW 9.94A.640)

RCW 9.94A.640

(1) Every offender who has been discharged under RCW 9.94A.637 may apply to the sentencing court for a vacation of the offender's record of conviction. If the court finds the offender meets the tests prescribed in subsection (2) of this section, the court may clear the record of conviction by: (a) Permitting the offender to withdraw the offender's plea of guilty and to enter a plea of not guilty; or (b) if the offender has been convicted after a plea of not guilty, by the court setting aside the verdict of guilty; and (c) by the court dismissing the information or indictment against the offender.

(2) An offender may not have the record of conviction cleared if:

(a) There are any criminal charges against the offender pending in any court of this state or another state, or in any federal court;

(b) The offense was a violent offense as defined in RCW 9.94A.030 or crime against persons as defined in RCW 43.43.830, except the following offenses may be vacated if the conviction did not include a firearm, deadly weapon, or sexual motivation enhancement: (i) Assault in the second degree under RCW 9A.36.021; (ii) assault in the third degree under RCW 9A.36.031 when not committed against a law enforcement officer or peace officer; and (iii) robbery in the second degree under RCW 9A.56.210;

(c) The offense is a class B felony and the offender has been convicted of a new crime in this state, another state, or federal court in the ten years prior to the application for vacation;

(d) The offense is a class C felony and the offender has been convicted of a new crime in this state, another state, or federal court in the five years prior to the application for vacation;

(e) The offense is a class B felony and less than ten years have passed since the later of: (i) The applicant's release from community custody; (ii) the applicant's release from full and partial confinement; or (iii) the applicant's sentencing date;

(f) The offense was a class C felony, other than a class C felony described in RCW 46.61.502(6) or 46.61.504(6), and less than five years have passed since the later of: (i) The applicant's release from community custody; (ii) the applicant's release from full and partial confinement; or (iii) the applicant's sentencing date; or

(g) The offense was a felony described in RCW 46.61.502 or 46.61.504.

(3)(a) Except as otherwise provided, once the court vacates a record of conviction under subsection (1) of this section, the fact that the offender has been convicted of the offense shall not be included in the offender's criminal history for purposes of determining a sentence in any subsequent conviction, and the offender shall be released from all penalties and disabilities resulting from the offense. For all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of that crime. A conviction that has been vacated under this section may not be disseminated or disclosed by the state patrol or local law enforcement agency to any person, except other criminal justice enforcement agencies. Nothing in this section affects or prevents the use of an offender's prior conviction in a later criminal prosecution, and nothing in this section affects the requirements for restoring a right to possess a firearm under RCW 9.41.040.

(b) A conviction vacated on or after July 28, 2019, qualifies as a prior conviction for the purpose of charging a present recidivist offense occurring on or after July 28, 2019, and may be used to establish an ongoing pattern of abuse for purposes of RCW 9.94A.535.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81259-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: August 6, 2021
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

August 06, 2021 - 10:36 AM

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